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No. 82-1372

IN THE

Supreme Court of the United States

October Term, 1982

THOMAS W. CULLEN, JR.,

Petitioner,

vs.

BMW OF NORTH AMERICA, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENT BMW OF NORTH AMERICA, INC. IN OPPOSITION

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Question Presented

Whether this Court should grant *certiorari* to review a Court of Appeals decision which reversed the trial court as a matter of law on an issue of state law in a diversity action?

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BRIEF OF RESPONDENT BMW OF NORTH AMERICA, INC. IN OPPOSITION

Statement of the Case

The Court of Appeals decided two narrow questions in this case: whether, under New York common law, an automobile franchisor has an affirmative duty to supervise the day-to-day activities of its independent franchisees; and whether under New York common law, a franchisor, in the absence of any agency relationship, is liable for the criminal conduct of its franchisee? The United States Court of

Appeals for the Second Circuit answered those questions in the negative.[1]

The Parties

BMW of North America, Inc.

BMW of North America, Inc. ("BMW/NA") is the exclusive importer and distributor in the United States of passenger cars, parts, and products manufactured by Bayerische Motoren Werke, A.G.[2] A Delaware corporation, BMW/NA has its principal place of business at Montvale, New Jersey. The sale and servicing of BMW vehicles imported into the United States by BMW/NA is conducted at the retail level by a network of franchised dealers. BMW/NA franchised dealers are independent business people who are granted authorized retail dealerships in accordance with the provisions of a standard Dealer Agreement; the Dealer Agreement sets forth the respective duties, obligations, and responsibilities of both BMW/NA and the dealer, and provides, essentially, that BMW/NA shall sell to the dealer and that the dealer shall purchase from BMW/NA, BMW products. The Dealer Standard Provisions, the terms of which expressly negate any agency relationship, are made a part of the Dealer Agreement.

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1. References to the Second Circuit's opinion, contained in Appendix A of the petition, are denoted by "P. App. A——"; references to the District Court opinion of January 29, 1982, contained in Appendix C of the petition, are denoted by "P. App. C——"; references to the District Court opinion of October 28, 1981, contained in Appendix A to this Brief, are denoted by "R. App. A——"; references to the District Court opinion of May 16, 1980, granting partial summary judgment, contained in Appendix B to this Brief, are denoted by "R. App. B——." All citations to the petition are denoted by "Pet. ——."

2. BMW/NA is a wholly owned subsidiary of BMW Holding Co., which is wholly owned by Bayerische Motoren Werke, A.G.

Plaintiff

Plaintiff, a New York stockbroker, and his wife, on their way to a dinner appointment, drove past the Bavarian Auto Sales, Inc. ("Bavarian") showrooms and decided to look for a car, having previously talked about buying a BMW automobile. Plaintiff picked out a BMW model 530i and gave the Bavarian salesman a deposit of $245. (This check was never cashed by Bavarian.) About five days later, plaintiff received a phone call from the salesman advising that the car had come in. Plaintiff was asked to send in a check for $18,000, the balance of the purchase price, which he did, although not without misgivings, on February 5, 1979. After plaintiff mailed the check to Bavarian, he called Bavarian several times asking for the car, but there were "a series of delays and runarounds" and he was given a variety of excuses. Not once, however, did he return to the Bavarian showroom to demand the car or the return of his money. And, at no time prior to the commencement of this action did plaintiff have any contact, either by telephone, in person, or by mail, with anyone at BMW/NA.

As a result of the failure of his efforts to obtain the vehicle or the return of his $18,000, plaintiff apparently consulted his attorney. Together, they filed criminal complaints with the Queens County District Attorney and the Attorney General of the State of New York, and perhaps contacted the New York City Department of Consumer Affairs. An action was commenced against Hans Eichler, Bavarian's principal, in Supreme Court, Nassau County, to recover the sum paid to Bavarian for the vehicle on the theory that Eichler had committed fraud. This action was subsequently commenced, as well.

Prior Proceedings

The Complaint

As amended, the complaint alleged four separate theories of liability: (1) that Bavarian was acting as agent for BMW/NA pursuant to principles of either actual agency or agency by estoppel (apparent agency); (2) that BMW/NA was negligent in permitting Bavarian to continue as a dealer because it had knowledge of Bavarian's allegedly precarious financial condition; (3) that BMW/NA entered into a conspiracy with Eichler, and in fact did defraud customers into doing business with Eichler; and (4) that BMW/NA's conduct constituted a prima facie tort.

At the conclusion of discovery, BMW/NA moved for summary judgment dismissing each of plaintiff's claims for relief. Addressing plaintiff's agency theories of liability first, the District Court found that "Bavarian was an independently owned and operated dealer, authorized to sell BMW automobiles, among others," therefore concluding that an actual agency relationship did not exist between BMW/NA and Bavarian. (R. App. B8b.) It also found no evidence to support plaintiff's causes of action for conspiracy to commit fraud and prima facie tort, and dismissed those claims as well. (R. App. B10b.) As to plaintiff's negligence claims, the District Court held that genuine issues as to material facts precluded the grant of summary judgment (R. App. B6b); similarly, it held that although plaintiff's agency by estoppel claim "might be difficult to establish at trial, plaintiff should have the opportunity to present the issue to a trier of fact." (R. App. B9b.) Thus, only the theories of negligence and agency by estoppel were left to be tried.

The District Court

Almost one year after the three-day non-jury trial, the District Court rendered a decision sustaining plaintiff's negligence theory of liability. As to the theory of agency by estoppel, the District Court found a "lack of proof of its essential elements" (R. App. A6a), specifically pointing to plaintiff's failure "to prove his reliance on Bavarian's *authority to act* for BMW/NA." (Emphasis in original.)

> Similarly, there [was] no evidence of Cullen's belief that the transaction was entered into by or for BMW/NA. On the contrary, plaintiff's own testimony shows there was an absence of reliance on advertisements, on the similarity between the corporate names of Bavarian and BMW/NA (Bavarian Motor Works), or on the BMW logo appearing on the sales slip.
>
> Plaintiff did testify as to his reliance on the BMW logo appearing on the outside of Bavarian's premises, but the question remains to what his reliance was directed. The testimony shows not a belief that Bavarian had authority to act for BMW/NA, but that the BMW logo represented a particular quality of cars sold at Bavarian. Since this testimony indicates, at most, Cullen's reliance on Bavarian's authority to sell BMW automobiles, plaintiff failed to carry its burden of proving the belief essential to agency by estoppel.

(R. App. A7a-8a.)

As to plaintiff's negligence theory of liability, however, the District Court rejected BMW/NA's argument that it owed no duty to plaintiff, finding instead that "plaintiff met its initial burden of proving facts which give rise to a

legal duty on the part of BMW/NA, for the protection of its franchisees' customers, to reasonably police the authorized use of the BMW name and supervise the operation of its franchise." (R. App. A10a-11a.) Basing its imposition of duty on two New York cases which purportedly supported its conclusion, the District Court held that

> Beyond its contractual obligations, BMW/NA, as the exclusive distributor of BMW products, owes the ultimate consumer a duty to actively police the authorized use of the BMW name and trademarks and to supervise its dealers' agents and employees in the operation of the franchised dealerships.

(R. App. A9a.)

But, the two cases which the District Court claimed established such a duty, *O'Boyle* v. *Avis Rent-A-Car System, Inc.*, 78 App. Div. 2d 431 (2d Dep't 1981); and *People* v. *Ludwig Baumann & Co.*, 56 Misc. 2d 153 (Sup. Ct. New York County 1968), did not, in fact, support the legal conclusions reached by the District Court. The *Avis* case involved the application of the long-established rule in New York that a principal (Avis) is responsble to a third person (O'Boyle) who is injured as a result of the acts of its agent. The imposition of liability in the *Baumann* case was predicated on the basis of the doctrine of agency by estoppel. In these circumstances, since the District Court had specifically negated the existence of both an agency relationship between BMW/NA and Bavarian, and agency by estoppel, BMW/NA moved the District Court, pursuant to Rules 52(b) and 59(e) of Fed.R.Civ.P., to amend the judgment to provide for dismissal of plaintiff's claims. (P. App. C2c.)

In response to BMW/NA's motion, the District Court rewrote its opinion, abandoned its reliance on the above two cases, and instead purported to "predict" that the New York Court of Appeals would come to the same result it reached if presented with the trial record established in this action. Relying on two recent Court of Appeals decisions applying well-established New York tort principles, the District Court "predicted" that

> the New York Court of Appeals would recognize a legal duty running from BMW/NA to plaintiff to prevent the risk of harm to BMW customers which results when dealers, whose financial instability and unscrupulous business practices are known to BMW/NA, are permitted to maintain the appearance of a responsible authorized BMW dealer subsequent to termination of the dealer agreement.

(P. App. C15c.)

The Court of Appeals

The Court of Appeals reversed the District Court's holding as a matter of law.[3] First, it held that "BMW/NA . . . did not owe a duty to supervise the operation of Bavarian and to terminate the franchise. . . ." (P. App. A2a.) It also found that the District Court had incorrectly determined that Cullen's injury was reasonably foreseeable and "erred in finding BMW/NA liable for negligent failure to police the operations of its independent franchisee" because of Bavarian's intervening criminal conduct. (P.

3. Petitioner's claim that the Court of Appeals violated Rule 52(a) of the Federal Rules of Civil Procedure (Pet. 5) is therefore misplaced. By its terms, Rule 52(a)'s reference to "a clearly erroneous" standard of review applies only to findings of fact, not conclusions of law. (Pet. 2-3.)

App. A7a.) In support of this finding, the Court of Appeals relied on well-established New York negligence principles which hold that,

> an intervening act, tortious or criminal, will ordinarily insulate a negligent defendant from liability when the subsequent act could not have been reasonably anticipated by the defendant. *Tirado* v. *Lubarsky*, 49 Misc. 2d 543, 268 N.Y.S.2d 54 (N.Y. Civ. Ct.), *aff'd*, 52 Misc. 2d 527, 276 N.Y.S.2d 128 (N.Y. App. Div. 1966).

(P. App. A8a.)

In reversing the District Court, the Court of Appeals did not disturb any of the lower court's factual findings; rather, it found that those findings did not support the legal conclusions which the District Court had derived therefrom.

REASONS FOR DENYING THE WRIT

The Holding of the Courts Below Presents No Question of General Importance Warranting Review By This Court

A review on writ of *certiorari* should be granted "only when there are special and important reasons therefor," such as where the decision presents a conflict among the Circuit Courts, a conflict with prior decisions of this Court, or "an important question of federal law which ha[s] not been, but should be, settled by this Court." Rule 17, United States Supreme Court Rules.

None of these considerations warranting review on *certiorari* is present here. Moreover, neither the District Court nor the Court of Appeals decided a novel, or im-

portant legal issue in a manner which requires review by this Court. Rather, the Court of Appeals resolved a purely state law issue by the application of well-established principles of New York law.

Under such circumstances, this Court has almost uniformly declined to overturn the decisions of the Courts of Appeal. *See, e.g., Commissioner* v. *Estate of Bosch,* 387 U.S. 456, 462 (1967) ("The issue presents solely a question of state law and '[w]e ordinarily accept the determination of local law by the Court of Appeals . . . and we will not disturb it here,' " quoting *Ragan* v. *Merchants Transfer & Warehouse Co.,* 337 U.S. 530, 534 (1949)); *Wolf* v. *Weinstein,* 372 U.S. 633, 636 (1963) ("the controversy . . . primarily implicates questions of Pennsylvania law and presents no federal question of substance. In the circumstances, the writ of certiorari as to that judgment of the Court of Appeals is dismissed as improvidently granted"); *General Box Co.* v. *United States,* 351 U.S. 159, 165 (1956) ("We ordinarily accept the determination of the Court of Appeals on questions of local law and we do so here").

The decision of this Court in *The Tungus* v. *Skovgaard,* 358 U.S. 588 (1959) is particularly instructive here. In that case, one of the issues the Court of Appeals was asked to resolve was whether state law imposed upon defendants a duty of exercising ordinary care. This Court found that the "Court of Appeals was correct in viewing the basic question before it as one of interpretation of the law of New Jersey," *id.* at 594, and had no reason to question the disposition of the case. *Id.*

This Court, moreover, has also been reluctant to reverse even those decisions of the Courts of Appeal which

arguably conflict with applicable local law, particularly those decisions relating to negligence, contracts, and property. R.L. Stern & E. Gressman, *Supreme Court Practice* 283 (5th ed. 1978) ("Stern & Gressman"). Thus, this Court, in *Estate of Spiegel* v. *Commissioner*, 335 U.S. 701 (1949), found it sufficient to sustain the Court of Appeals' holding that reasonable arguments could be made, based on state law cases, to support a determination of the issue either for or against petitioner's claim. *Id.* at 708. *See also Ross* v. *Moffitt*, 417 U.S. 600, 618 (1974) (the Supreme Court's review is discretionary and "depends on numerous factors other than the perceived correctness of the judgment [it is] asked to review"). For that reason,

> [u]nless there is an exceptionally clear showing of error by the court of appeals, the Court is likely to give scant consideration to a certiorari petition based upon such a conflict. The Court uniformly declines review whenever the court of appeals has reached a reasonable and permissible result.

Stern & Gressman, *supra*, at 283.

Because the question which this Court is now being asked to consider is exclusively a state law issue, and, in any event, there has not been "an exceptionally clear showing of error" (indeed, petitioner claims none), we respectfully suggest that this Court should not grant *certiorari*.

Conclusion

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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March 10, 1983

APPENDIX A

Memorandum of Decision and Order (October 28, 1981)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

79 C 970

THOMAS W. CULLEN, JR.,

Plaintiff,

against

BMW OF NORTH AMERICA, INC.,

Defendant.

Appearances:

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Appendix A

NEAHER, District Judge.

Plaintiff, Thomas W. Cullen, Jr., seeks to recover $18,000 with interest, plus punitive damages, paid to Bavarian Auto Sales, Inc. (Bavarian), a BMW dealer formerly franchised by defendant, BMW of North America, Inc. (BMW/NA). BMW/NA is "the exclusive importer and distributor in the United States of passenger cars, parts and products manufactured by Bayerische Motoren Werke, AG." Plaintiff's Exhibit 93. A Delaware corporation, BMW/NA has its principal place of business at Montvale, New Jersey. This diversity action is now before the Court subsequent to partial summary judgment in favor of defendant and trial without a jury on the remaining issues.[1]

The facts established at trial follow. On January 24, 1979 Cullen entered into a sales contract with Bavarian for a new 1978 BMW, Model 530i, at a price of $18,245. Having paid a deposit of $245, Cullen received a call five days later from the salesman advising that the car had arrived and requesting a check for the balance of the purchase price. Plaintiff remitted a check for $18,000, which was cashed by Bavarian, but never received the car or the return of his money.

Cullen commenced a civil action against Bavarian in New York State Supreme Court, Nassau County, which was stayed when Bavarian's president, Hans Eichler, filed a petition in bankruptcy. Cullen also filed criminal complaints

1. In *Cullen* v. *BMW of North America, Inc.*, 490 F. Supp. 249 (E.D.N.Y. 1980), we granted in part defendant's motion for summary judgment, leaving for further development of facts the issues of agency by estoppel and negligence discussed herein.

with the Queens County District Attorney and the Attorney General of the State of New York, although no indictments were issued.[2] This action was subsequently commenced.

Bavarian operated continuously as an authorized BMW dealer from at least June of 1976 to February 16, 1979, on which date Eichler voluntarily terminated all agreements between Bavarian and BMW/NA. Three written franchise agreements were entered into during this time: (1) from June 1 to December 31, 1976; (2) from August 12 to December 31, 1977; and (3) from January 1 to December 31, 1978. Although no written agreement was in effect from January 1 to August 12, 1977 or from January 1 to February 16, 1979, Bavarian continued to operate as a duly franchised BMW dealer during these periods. In fact, recognizing the continuation of dealerships without formal agreement is not an unusual practice for BMW/NA. Trial Transcript at 2.125-26.

From the beginning of Bavarian's relationship with BMW/NA, the latter received indications of Bavarian's financial instability. For example, difficulty in receiving payment for cars and parts prompted BMW/NA to place Bavarian on a C.O.D. certified check basis, rather than open account status, in the latter part of 1976. Additionally, despite Bavarian's contractual obligations and BMW/NA's repeated requests, Bavarian furnished only two monthly financial statements during the several years it operated.

2. Eichler and Bavarian were indicted for three counts of grand larceny in the second degree, the record of which was filed in the New York Supreme Court, Queens County, on March 6, 1980. Plaintiff's Exhibit 4. But apparently the indictments refer to conduct by the accused toward individuals other than Cullen. On February 5, 1981, Eichler pleaded guilty to attempted grand larceny in the second degree.

Further, from 1976 onward, Bavarian demonstrated persistent difficulty in maintaining minimum credit lines essential to standard operation of BMW dealerships. Finally, throughout the operation of the franchise Bavarian repeatedly failed to maintain sufficient funds to enable legitimate issuance of checks to BMW/NA, other BMW dealers, and customers.

During the latter part of 1978, Bavarian's instability escalated, and BMW/NA received intensified indications of its financial irregularities and irresponsibility. For example, from July to September 1978, BMW/NA received five customer complaints against Bavarian, each of which alleged Bavarian had taken partial payment for a car but had neither delivered the vehicle nor refunded the payment. In some of these cases, Bavarian had issued checks on insufficient funds to refund deposits made by the customers. Further, during 1978, checks aggregating some $40,000 were issued by Bavarian to BMW/NA upon accounts with insufficient funds.

On October 30, 1978, BMW/NA extended an initial sixty-day period granted Bavarian to re-establish its financial viability. This period was extended to November 14, 1978, but Bavarian still failed to remedy its deficiencies by that date.

On November 15, 1978, Bavarian represented to BMW/NA that approval of funds from the Small Business Administration and Citibank was imminent, but no such approval ensued. On December 7, 1978, BMW/NA received notice from Lloyd Capital Corporation that Bavarian had established a line of credit, but a week later BMW/NA learned that Eichler had misrepresented his intention to follow

through with the credit application process, had never signed a formal agreement with Lloyd, and had never paid Lloyd the $1000 required by law to be submitted prior to execution of the agreement.

In a letter dated December 18, 1978, BMW/NA notified Eichler that because of "serious and continuing deficiencies" in the dealership, BMW/NA would not offer him a 1979 dealer agreement. The deficiencies outlined in the letter were: (1) failure to observe minimum wholesale credit requirement; (2) impairment of financial reputation, including issuance of checks, later dishonored, to other BMW dealers; (3) parts accounts arrearages, including issuance of checks, later dishonored, to BMW/NA; (4) failure to observe parts inventory requirements; and (5) failure to submit year-end and monthly financial and operating statements.

Although Eichler responded to the above letter on December 29, 1978, expressing his desire to continue the dealership, BMW/NA did not reply to confirm either termination or extension of the franchise. The next contact evidences BMW/NA's recognition of the continued operation of the Bavarian franchise: it refused to authorize Eichler's proposed sale of Bavarian to an existing dealer. Had BMW/NA asserted its rights under the dealer agreement, which had expired by its own terms on December 31, 1978, it could have insisted that Bavarian remove at its own expense all BMW signs displayed publicly, refrain from using BMW trademarks, destroy all printed material bearing BMW trademarks, and cease to hold itself out as an authorized BMW dealer. Plaintiff's Exhibit 103. Further, BMW/NA could have required Bavarian to sell and de-

liver to BMW/NA all new vehicles, parts and tools purchased by Bavarian from BMW/NA. Instead, BMW/NA allowed Eichler to continue holding out Bavarian as an authorized dealership, as evidenced by the BMW logo publicly displayed on the outside of the showroom and the use of printed materials bearing BMW trademarks.

It should be noted that August 1978 was the last time BMW/NA received payment for any cars allocated to Bavarian. Further, in December 1978 BMW/NA removed all cars it had delivered to Bavarian for failure to maintain a minimum credit structure. Yet, during January and February of 1979, the showroom contained several new BMW vehicles borrowed from other dealers, thus giving Bavarian the appearance of a viable ongoing business.

On February 13, 1979, a meeting was held to discuss the future of Bavarian. This meeting was approximately two weeks after Cullen had been denied delivery of the car, and although Cullen had not contacted BMW/NA, at the meeting BMW/NA was apprised of information that Eichler had accepted deposits from seven customers totalling $100,000 and had used the money for other purposes. Still, BMW/NA made no definitive response, and three days later Eichler voluntarily resigned the franchise. Only at that point did BMW/NA pursue its rights subsequent to termination outlined above.

The record is clear that Bavarian was an independently owned and operated dealership, but plaintiff seeks to hold BMW/NA liable under the doctrine of agency by estoppel. This theory must fall for lack of proof of its essential elements. It is well settled that agency by estoppel arises only when the party charged as principal intentionally or care-

lessly causes the belief that the putative agent is authorized to bind that party. *Karavos Compania Naviera S.A.* v. *Atlantic Export Corp.*, 588 F.2d 1, 11 (2d Cir. 1978); Restatement of Agency 2d §8B; 2 N.Y.Jur., Agency §§25, 87. Moreover, under New York law,

> "apparent or ostensible authority, or agency by estoppel, is created only by acts or neglects of the person sought to be charged as principal, and the person dealing with the ostensible agent must have known of and relied upon such acts or omissions, and such reliance must be in good faith and in the exercise of reasonable prudence." *Perry* v. *New York Life Ins. Co.*, 22 N.Y.S.2d 696, 701-02 (Sup. Ct. 1940).

Although plaintiff offered into evidence various public manifestations of a relationship between Bavarian and BMW/NA, he failed to prove his reliance on Bavarian's *authority to act* for BMW/NA. Similarly, there is no evidence of Cullen's belief that the transaction was entered into by or for BMW/NA. On the contrary, plaintiff's own testimony shows there was an absence of reliance on advertisements, on the similarity between the corporate names of Bavarian and BMW/NA (Bavarian Motor Works), or on the BMW logo appearing on the sales slip.

Plaintiff did testify as to his reliance on the BMW logo appearing on the outside of Bavarian's premises, but the question remains to what his reliance was directed. The testimony shows not a belief that Bavarian had authority to act for BMW/NA, but that the BMW logo represented a particular quality of cars sold at Bavarian. Since this testimony indicates, at most, Cullen's reliance on Bavarian's authority to sell BMW automobiles, plaintiff

failed to carry its burden of proving the belief essential to agency by estoppel.

Turning to plaintiff's negligence theory, the evidence adduced at trial shows that BMW/NA unreasonably permitted Bavarian to continue holding itself out to the public as an authorized BMW dealer, and to purport to sell Cullen a car, during a period in which defendant had ample knowledge of Bavarian's precarious financial condition and history of questionable business practices. Yet, proving the unreasonableness of defendant's conduct does not establish actionable negligence. To accomplish the latter plaintiff must first sustain his burden of proving the breach of a legal duty owing by defendant to plaintiff, a violation of plaintiff's rights. *Palsgraf* v. *Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928).

Defendant argues that BMW/NA owed Cullen no duty to enforce the provisions of its agreement with Bavarian, based on plaintiff's inability to claim as a third-party beneficiary under that contract. The argument is correct as far as it goes, for it is true that the parties to the agreement, in establishing their distributor/dealer relationship, expressed no intent to confer a direct benefit on ultimate consumers. In the absence of such expression, plaintiff assumes the status of an incidental beneficiary, unable to enforce contractual rights or recover for failure to perform contractual duties. *Bernal* v. *Pinkerton's, Inc.*, 52 App. Div. 2d 760, 382 N.Y.S.2d 769 (1st Dept. 1976), *aff'd*, 41 N.Y.2d 938, 363 N.E.2d 362, 394 N.Y.S.2d 638 (1977); *Beck* v. *FMC Corp.*, 53 App. Div. 2d 118, 385 N.Y.S.2d 956 (4th Dept. 1976), *aff'd*, 42 N.Y.2d 1027, 369 N.E.2d 10, 398 N.Y.S.2d 1011 (1977).

Yet the Court is not willing to take such a narrow view of BMW/NA's duty. Beyond its contractual obligations, BMW/NA, as the exclusive distributor of BMW products, owes the ultimate consumer a duty to actively police the authorized use of the BMW name and trademarks and to supervise its dealers' agents and employees in the operation of the franchised dealerships. Cognizant of our function, sitting in a diversity action, to ascertain not what New York law should or will be, but what it is, *Hausman* v. *Buckley*, 299 F.2d 696, 704 (2d Cir.), *cert. denied*, 396 U.S. 885 (1962), we would not impose such a duty were its substance not already established by previous law.

In *O'Boyle* v. *Avis Rent-A-Car System, Inc.*, 78 App. Div. 2d 431, 435 N.Y.S.2d 296 (2d Dept. 1981), co-defendant G. Roland House owned and operated a gasoline station and an Avis car rental franchise. A vehicular accident occurred when a 16-year-old employee of House, while driving a rental car, collided with another vehicle. The victims or their representatives not only sued the unlicensed employee but also advanced a negligence theory against both House and Avis. The trial court, in charging the jury on negligence, explained the plaintiff's theory against Avis as follows:

> "Then, as far as the Defendant Avis is concerned . . . that they [sic] were negligent in failing to supervise its agents, in failing to supervise its franchises' agents in the operation of its automobile rental agencies, failing to properly train its franchises' agents in the operation [and] management and so forth of the rental agency." 78 App. Div. 2d at 436-37, 435 N.Y.S.2d at 299.

Appendix A

The question before the appellate court in *Boyle* was whether the verdict against both defendants was tenable. In affirming, the court held that the evidence sustained a finding that each defendant was negligent under the theory posited against it and that the cited omissions proximately caused the injuries. The court therefore implicitly found a legal duty owing foreseeable plaintiffs by Avis to properly supervise the operation of its rental franchise.[3]

Further, in *People* v. *Ludwig Baumann & Co.*, 56 Misc. 2d 153, 288 N.Y.S.2d 404 (Sup. Ct. 1968), a proceeding to enjoin bait and switch advertising under N.Y. Gen. Bus. Law §396, the franchisor was held responsible for the franchisee's fraudulent business practices, even though it lacked knowledge of those practices. Holding that "any reputable business firm" is under a legal duty "to allow its name to be used only where it takes active steps to prevent the misuse of its name for the purposes of fraud and deceit," the court concluded that public policy could not "condone the practice of licensing use of a business or trade name without undertaking to guard against its misuse . . . in the sale of products." 56 Misc. 2d at 158, 288 N.Y.S.2d at 410.

Having proved that Bavarian was a former BMW/NA franchised dealer,[4] plaintiff met its initial burden of prov-

3. Although some of the appellate court's language was couched in terms of agency, there was no discussion of an agency relationship between Avis and House, nor would the facts appear to support such a theory. Further, the negligence theory posited against Avis in the quoted jury charge clearly states Avis' duty "to supervise its franchises' agents." This was the theory of liability on which the verdict, subsequently upheld, was based.

4. Although there appears to have been no sale of a franchise between BMW/NA and Bavarian so as to bring their relationship within the definition provided by the New York Franchise Sales Act,

(footnote continued on next page)

ing facts which give rise to a legal duty on the part of BMW/NA, for the protection of its franchisees' customers, to reasonably police the authorized use of the BMW name and supervise the operation of its franchise. We turn now to defendant's argument that there was not breach of that duty.

Defendant, in sum, argues that BMW/NA was prohibited by law from terminating the franchise on the basis of Bavarian's known financial deficiencies. Citing 15 U.S.C. §§1221-25 and N.Y. Gen. Bus. Law §§195-98, defendant claims that in the circumstances of this case Bavarian could have successfully sued to enjoin any such termination. This argument fails for several reasons. First, the federal statute cited applies only to automobile manufacturers, and not to distributors in the absence of an indication of control by the manufacturer. See, *e.g., Stansifer* v. *Chrysler*

N.Y. Gen. Bus. Law §681(3), defendant itself recognizes that Bavarian was a "BMW/NA franchised dealer." Defendant's Post-Trial Memorandum of Law, at 1. Moreover, the restrictive definition of "franchise" in the Franchise Sales Act, which took effect January 1, 1981, could hardly be held to define the relationship of Bavarian to BMW/NA from June 1976 to February 1979. Under modern-day practices, franchise is commonly understood as an agreement

> "under which the franchisee undertakes to conduct business or sell a product or service in accordance with methods and procedures prescribed by the franchisor and the franchisor undertakes to assist the franchisee through advertising, promotion, and other advisory services."

1 G. Glickman, Franchising §2.01, at 2-2.1 (1981). The facts at trial showed the existence of such a relationship between BMW/NA and Bavarian.

As a further note, however the relationship is defined, it is clearly sufficient to justify imposition of the duty recognized in *O'Boyle* v. *Avis Rent-A-Car Systems, Inc.*, 78 App. Div. 2d 431, 435 N.Y.2d 296 (2d Dept. 1981), in extremely similar circumstances.

Motors Corp., 487 F.2d 59 (9th Cir. 1973). Second, BMW/NA's right to terminate becomes moot in light of the expiration of the dealer agreement on December 31, 1978. Third, the prohibition in N.Y. Gen. Bus. Law §197-a against refusal to renew automobile dealer agreements provides a good faith exception, and defendant has cited no case which enjoins such refusal under circumstances as egregious as those outlined in BMW/NA's letter dated December 18, 1978, Plaintiff's Exhibit 43.

Stripped of its purported legal barriers to definitively respond to Bavarian's continued deficiencies and questionable business practices, defendant is left without justification for failure to discharge its duty. The evidence shows that BMW/NA unreasonably allowed Bavarian to continue using the BMW name after expiration of the dealership and after notice of Eichler's propensity for unscrupulous business dealings. The evidence further shows that BMW/NA failed to supervise the operation of the franchise during this period of Bavarian's undefined existence and increased risk to customers. Plaintiff thus proved defendant's breach of duty.

Turning to the issue of causation, defendant contends that plaintiff's injury was not a reasonably foreseeable result of BMW/NA's negligence. Citing law "long established in New York," defendant argues that Eichler's conduct constitutes an intervening criminal act and hence necessarily breaks the causal chain, insulating defendant from liability. See, *e.g.*, *Lowery* v. *Western Union Telegraph Co.*, 60 N.Y. 198 (1875).

Such a rule is by no means established in New York. Determination of proximate cause ultimately turns "upon

the precise factual pattern of each individual case." *Hoggard* v. *Otis Elevator Co.*, 52 Misc. 2d 704, 707, 276 N.Y.S.2d 681, 686 (Sup. Ct. 1966), *aff'd mem.*, 28 App. Div. 2d 1207, 285 N.Y.S.2d 262 (1st Dept. 1967). See also *O'Neill* v. *City of Port Jervis*, 253 N.Y. 423, 433, 171 N.E. 694, 697 (1930). Moreover, an intervening act, tortious or criminal, will insulate a negligent defendant from liability only when the subsequent act could not have been reasonably anticipated by the first actor. *Lillie* v. *Thompson*, 332 U.S. 459 (1947); *Sherman* v. *Concourse Realty Corp.*, 47 App. Div. 2d 134, 365 N.Y.S.2d 239 (2d Dept. 1975); Restatement of Torts 2d §§302B, 448-49.

The New York Court of Appeals has stated the rule as follows:

> "In this regard, it was plaintiffs' burden to show that defendants' conduct was a substantial causative factor in the sequence of events that led to [the] injury (see Restatement, Torts 2d, §430; Prosser, Torts [4th ed.], §42). Of course, the fact that the 'instrumentality' which produced the injury was the criminal conduct of a third person would not preclude a finding of 'proximate cause' if the intervening agency was itself a foreseeable hazard (see Restatement, Torts 2d, §§302B, 449; Prosser, Torts [4th ed.], at pp. 271-272)." *Nallan* v. *Helmsley-Spear, Inc.*, 50 N.Y.2d 507, 520-21, 407 N.E. 2d 451, 459, 429 N.Y.S.2d 606, 614 (1980).

Thus, the first step of analysis is whether defendant's conduct was a substantial factor in bringing about plaintiff's harm. In other words, the Court must determine whether a reasonable person would regard BMW/NA's negligence a cause of Cullen's harm in the sense that it was

"responsible" for the injury. *Hoggard* v. *Otis Elevator Co., supra,* 52 Misc. 2d at 707, 276 N.Y.S.2d at 686; Restatement of Torts 2d §431, Comment (a), at 429.

Here, the evidence shows that BMW/NA created a situation which afforded Bavarian the opportunity to defraud or steal from customers relying on the good reputation of BMW. Cullen walked into the showroom specifically relying on the publicly displayed BMW logo as representing a particular level of quality product. The situation was such as to give him no notice of any deficiency in the franchise or Bavarian's relationship with BMW. BMW/NA, on the other hand, was well aware of Bavarian's impairment of BMW's reputation through various acts enumerated in the letter of December 18, 1978, yet it failed to take the available steps to prevent the further misuse of the BMW name and the misrepresentation that Bavarian continued to be an authorized BMW dealer. Moreover, knowing Bavarian's tenuous situation after expiration of the dealer agreement on December 31, 1978, BMW/NA failed to supervise its business dealings, thereby allowing Cullen to transact business with a "paper" BMW dealership lacking any tie with BMW whatsoever. These facts show that BMW/NA's conduct constituted a "substantial causative factor" in plaintiff's harm.

The second step under *Nallan* v. *Helmsley-Spear, Inc., supra,* requires the Court to determine whether Bavarian's intervening act was itself a foreseeable risk of BMW/NA's negligence. Stated differently,

> "a wrongdoer must answer for all the consequences that may ensue in the ordinary course of events, even

though such consequences are immediately and directly brought about by an intervening cause, if such intervening cause was set in motion by the original wrongdoer, or was in reality only a condition on or through which the negligent act operated to produce the injurious result. The type of intervening cause which relieves the original wrongdoer is a cause which interrupts the natural sequence of events, turns aside their course, prevents the natural and probable result of the original act or omission, and produces a different result that could not have been reasonably anticipated." *Hoggard* v. *Otis Elevator Co., supra,* 52 Misc. 2d at 708, 276 N.Y.S.2d at 687-88 (citations omitted).

The facts in evidence show that BMW/NA had knowledge of at least five recent incidents prior to Cullen's in which Bavarian had received partial payment for automobiles and had not delivered the cars. In some of these cases, Bavarian had issued checks on insufficient funds to refund the payments. Although the customer complaints were subsequently resolved, BMW/NA was apprised of Bavarian's propensity for unscrupulous business transactions. In this light, Eichler's conduct perpetuated rather than interrupted the "natural sequence of events" stemming from defendant's negligence. Moreover, "the exact occurrence or the precise injury" need not be foreseen. *Horstein* v. *General Motors Corp.*, 391 F. Supp. 1274, 1277 (S.D.N.Y. 1975). BMW/NA should have reasonably foreseen that Bavarian might have intentionally caused some financial harm to some BMW customer as a result of its original negligence, and this is sufficient.

According to the foregoing, judgment is entered for plaintiff in the amount of $18,000 plus interest thereon at the rate of 12% from April 13, 1979. Based on the evidence adduced at trial, punitive damages do not seem appropriate.

So Ordered.

The Clerk of the Court is directed to enter judgment for plaintiff and to forward copies of this memorandum decision and order to counsel for the parties.

/s/ Edward R. Neaher
U. S. D. J.

Dated: Brooklyn, New York
October 28, 1981

APPENDIX B

Memorandum and Order of the District Court (May 16, 1980)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

79 C 970

THOMAS W. CULLEN, JR.,

Plaintiff,

against

BMW OF NORTH AMERICA, INC.,

Defendant.

Appearances:

LOUIS J. CASTELLANO, JR., ESQ.
Attorney for Plaintiff

WEIL, GOTSHAL & MANGES
Attorneys for Defendant
By KEVIN P. HUGHES, ESQ.
YVETTE MILLER, ESQ.

Appendix B

NEAHER, District Judge.

Plaintiff in this action seeks to recover approximately $18,000 he paid to Bavarian Auto Sales, Inc. ("Bavarian"), then a franchised BMW dealer, for the purchase of a new automobile he never received. The undisputed facts reveal that plaintiff and Bavarian entered into a sales contract on January 24, 1979, and plaintiff promptly remitted the full purchase price upon Bavarian's representation that the vehicle had arrived and was being serviced. After Bavarian failed to keep its part of the bargain and deliver the BMW automobile, plaintiff commenced a civil action against Bavarian in New York State Supreme Court, Nassau County, which was stayed when Bavarian's president, Hans Eichler, filed a petition in bankruptcy in Connecticut. This diversity action against BMW of North American ("BMW/NA"), a New Jersey corporation, followed.

The amended complaint asserts four causes of action, presenting four separate theories of recovery. The first is based upon an agency theory: it is claimed that defendant as manufacturer and distributor of BMW vehicles is responsible for the actions of Bavarian either pursuant to principles of apparent authority or agency by estoppel. The second cause of action sounds in negligence based primarily on the defendant's alleged knowing tolerance of a financially unstable dealer for months prior to plaintiff's order. Plaintiff's third cause of action alleges a conspiracy between Bavarian and defendant to defraud customers of Bavarian, and the fourth cause of action claims that BMW/NA's conduct in the circumstances constituted a prima facie tort. The action is now before the court on defendant's

motion for summary judgment pursuant to Rule 56, F.R. Civ.P. For the following brief reasons, defendant's motion is granted in part and denied in part.

Summary judgment may be rendered only "if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), F.R.Civ.P. In determining whether to grant a motion for summary judgment, the court "cannot try issues of fact; it can only determine whether there are issues to be tried." *American Mfrs. Mut. Ins. Co.* v. *American Broadcasting-Paramount Theatres, Inc.*, 388 F.2d 272, 279 (2d Cir. 1967), *quoted in Securities Exchange Commission* v. *Research Automation Corp.*, 585 F.2d 31, 33 (2d Cir. 1978). It must accept as true factual statements in the opposing party's affidavits, draw all permissible inferences in that party's favor, *Hill* v. *A-T-O, Inc.*, 535 F.2d 1349 (2d Cir. 1976), and resolve any doubts in favor of the latter, *American Mfrs. Mut. Ins. Co.* v. *American Broadcasting-Paramount Theatres, Inc., supra.*

"The very mission of the summary judgment procedure [however] is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Adv. Com. Note to Proposed Amendments to Rule 56(e), 31 F.R.D. 648 (1962). As the Court of Appeals for this circuit recently stated:

> "Thus, the mere possibility that a factual dispute *may* exist, without more, is not sufficient to overcome a convincing presentation by the moving party. *See Gatling* v. *Atlantic Richfield Co.*, 577 F.2d 185, 187-88 (2d

Cir. 1978), *cert. denied*, 439 U.S. 868 (1979). The litigant opposing summary judgment, therefore, 'may not rest upon mere conclusory allegations or denials' as a vehicle for obtaining a trial. *SEC* v. *Research Automation Corp.*, 585 F.2d 31, 33 (2d Cir. 1978). Rather, he must bring to the district court's attention some affirmative indication that his version of relevant events is not fanciful." *Quinn* v. *Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 445 (2d Cir. 1980).

With these principles in mind, it is the court's view that summary judgment dismissing plaintiff's third and fourth causes of action sounding in conspiracy and prima facie tort is appropriate but that resolution of the remaining claims must await further development of the record.

Turning first to plaintiff's negligence claim, it is manifest that genuine issues as to material fact preclude a grant of summary judgment. The basis of the claim is that defendant permitted Bavarian to continue as a BMW dealer —and to sell plaintiff an automobile on January 24, 1979— with knowledge of Bavarian's allegedly precarious financial condition. Notwithstanding evidence in the record to the contrary, plaintiff has successfully opposed the motion with ample evidence from which a trier of fact might infer that BMW/NA had knowledge of Bavarian's financial difficulties and might conclude defendant unreasonably permitted Bavarian to continue to hold itself out as an authorized dealer. Plaintiff has submitted a number of letters from defendant to Bavarian excepting to various business practices, among them Bavarian's apparently chronic habit of presenting checks which were later dishonored, and indicating defendant's awareness of Bavarian's financial difficulties and in-

tention to monitor the situation closely. He has also presented defendant's customer relations forms attesting to various customer complaints about Bavarian's conduct. Finally, plaintiff has submitted a letter from BMW/NA to Bavarian dated December 18, 1978, in which defendant at great length chronicles Bavarian's deficiencies and concludes in the following manner:

> "However, if you are interested in continuing as a BMW dealer, please contact us by January 5, 1979 to discuss with you in greater detail the deficiencies cited above and the action which would have to be taken by you in order to rectify such deficiencies. If we can reach a satisfactory understanding with respect to these matters, we will send you a written confirmation of our intention to offer you a 1979 dealer agreement, which confirmation will set forth in detail the deficiencies to be rectified, the corrected measures to be taken and the time period in which this may be accomplished.
>
> "Should we fail to hear from you by the 5th of January, please be advised that we shall consider your failure to respond as a voluntary termination of our relationship. . . ." (Letter of Friedrich Hanau, dated December 18, 1978.)

The record appears to indicate that defendant took no action to terminate officially Bavarian's relationship from January 5, 1979, until at least January 24, 1979, the date plaintiff purchased his BMW. At the time of plaintiff's purchase, Bavarian continued to operate under the BMW logo and in the same manner as before, although defendant was aware that Bavarian had received no new automobiles for several months and had no floor plan to pay for them.

On this record, plaintiff contends defendant breached a duty to him by permitting Bavarian to continue to hold

itself out as a BMW dealer until its voluntary resignation on February 16, 1979. Defendant argues that, assuming it owed a duty to plaintiff and had knowledge of Bavarian's unstable financial condition, it nonetheless cannot be held liable as a matter of law since plaintiff's injury was not foreseeable. Defendant claims that it cannot be held negligent because of the intervening, unforseeable criminal act of its "agent." While apparently a correct statement of New York law, see, *e.g., Ward* v. *State*, 366 N.Y.S.2d 800, 807 (Ct. of Claims 1975); *Smith* v. *ABC Realty Co.*, 336 N.Y.S.2d 104 (App. Term 1st Dept. 1972); *Tirado* v. *Lubarsky*, 268 N.Y.S.2d 54 (Civ. Ct. Bronx Cty.), *aff'd*, 276 N.Y.S.2d 128 (App. Term 1st Dept. 1966); *cf. Sherman* v. *Concourse Realty Corp.*, 365 N.Y.S.2d 239 (2d Dept. 1975), its applicability in the circumstances of this case is uncertain since defendant has failed to establish on this motion that criminal conduct was involved in Bavarian's failure to deliver an automobile to plaintiff. The record is bare of evidence that criminal conduct rather than irresponsible management of Bavarian was the cause of plaintiff's injuries. Assuming the latter and defendant's knowledge of such management, BMW/NA cannot escape a trial on the issue of its negligence by characterizing Bavarian's conduct as criminal or accusing its president of absconding with plaintiff's money. It appears resolution of the negligence issue must be left to the trier of fact.[1]

1. We have also considered defendant's arguments concerning its obligations under various State and federal laws regulating the relationship between motor vehicle manufacturers and distributors and their franchised dealers. The claim is made that under the Federal

(footnote continued on next page)

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Having determined that plaintiff's negligence theory must be left to a trier of fact, the court is of opinion that plaintiff's agency theory, although exceedingly broad in its present form, must also await further development of the record. Plaintiff suggests that under either an apparent authority theory or by application of the doctrine of agency by estoppel he is entitled to relief. Defendant persuasively argues, however, that principles of apparent authority do not readily apply in this case: there is no evidence that an actual agency relationship existed and that defendant permitted Bavarian to exceed the limited bounds of that agency. On the other hand, the principle of agency by estoppel is colorably applicable. Although no actual agency relationship exists, such an agency may arise where the party charged as principal permits the putative agent to act in such a manner that a reasonable man might infer that an agency relationship in fact existed. See Restatement of Agency §8, comment (d) (1958); 2 N.Y. Jurisprudence, Agency §§25, 87. See also *S.S. Silberblatt, Inc.* v. *Seaboard Surety Co.*, 417 F.2d 1043, 1049 (8th Cir. 1969). Agency by

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Dealer-Day-in Court Act, 15 U.S.C. §§1221-1225, and New York Gen. Bus. Law §§195-197A, defendant owed Bavarian the opportunity to fulfill its obligations under their agreement and hence its right to terminate the agreement was severely restricted. The argument is unpersuasive in the circumstances.

There can be little doubt that a manufacturer's duty to deal in good faith with its franchised dealers does not, standing alone, relieve it of duties, if any, owed to ultimate consumers to prevent foreseeable harm. In any event, issues of fact preclude summary judgment on the ground that defendant was duty bound not to terminate Bavarian at any time prior to plaintiff's transaction with Bavarian.

Finally, defendant has neither argued nor presented authority for the proposition that it had no duty to protect plaintiff against the risk of harm in the circumstances of this case.

estoppel may arise if "the person sought to be charged intentionally or carelessly caused the plaintiff to believe in the authority of the purported agent." *Karavos Compania, etc.* v. *Atlantica Export Corp.*, 588 F.2d 1, 11 (2d Cir. 1978).

The record here is clear that Bavarian was an independently owned and operated dealer, authorized to sell BMW automobiles among others. Plaintiff contends that in purchasing the automobile from Bavarian he relied on defendant's reputation for manufacturing quality products and for business integrity. Of greater relevance to the issue of agency by estoppel, plaintiff claims BMW/NA permitted Bavarian to display prominently the BMW logo on its premises, in advertising and promotional campaigns, and on Bavarian's stationery and sales invoices in accordance with "reasonable suggestions set forth by BMW/NA." Dealer Standard Provisions §4(c). The record reveals that Bavarian's sales slips clearly read "Bavarian Auto Sales and Service, Inc." and these words were flanked on either side by the BMW logo. The Bavarian stationery contained, moreover, the words "authorized sales and service" beneath the BMW logo. Plaintiff asserts that under these circumstances a man of reasonable prudence could conclude that Bavarian was BMW/NA's agent.

Defendant relies primarily on *Oberlin* v. *Marlin American Corp.*, 596 F.2d 1322 (7th Cir. 1979), and *Stalzer* v. *Ford Motor Co.*, 180 N.Y.L.J. 109 (Nassau County Sup. Ct., December 8, 1978), at page 15, column one, to support its claim that summary judgment is appropriate. Such reliance is misplaced. In *Oberlin*, defendant agreed to market products made by a company called "Melabs." Plaintiff en-

tered into an agreement with defendant to act as zone distributor of Melabs' products. When a dispute arose, plaintiff sued defendant and SCM Corporation, which had just taken over Melabs, on the theory that defendant was an agent of Melabs because it sold its goods. The court of appeals rejected plaintiff's agency by estoppel theory stating that defendant's advertising clearly indicated that Melabs was the manufacturer of the products and defendant was merely a distributor. Hence, no agency by estoppel could be inferred. In *Stalzer*, the court found that the purchase order signed by plaintiff was clearly marked with the dealer's name exclusively and that no representation from which an inference of agency could be drawn had been made by the dealer. Plaintiff's conclusory allegation of agency was unsupported by evidentiary fact and therefore insufficient to withstand a motion for summary judgment.

In contrast, plaintiff has suggested that the basis for his agency by estoppel claim is in Bavarian's sales invoice and various signs and use of the BMW logo. BMW stands for Bayerische Motoren Worke or Bavarian Motor Works. Unlike the situation in *Oberlin* and *Stalzer*, in which the entities were clearly separate and distinct, Bavarian Motor Works and Bavarian Auto Sales and Service, Inc., are sufficiently alike—taken together with other indicia of agency—as to make summary judgment on plaintiff's contention that an agency by estoppel arose inappropriate at this time. Although the claim might be difficult to establish at trial, plaintiff should have the opportunity to present the issue to a trier of fact. Nothing in the court's comments, of course, should be construed as an opinion on the merits of this or any other claim.

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Finally, little discussion is needed to dispose of plaintiff's remaining claims. It is well settled in New York that civil conspiracy to commit fraud, standing alone, is not actionable. See, *e.g., Ghazoul* v. *International Management Services, Inc.*, 398 F. Supp. 307, 311-12 (S.D.N.Y. 1975), *quoting Brackett* v. *Griswold*, 112 N.Y. 454, 466-67 (1889); see also *Taylor* v. *Cowit*, 244 N.Y.S.2d 845, 846 (Bronx Sup. Ct. Spec. T. 1963), *modified*, 246 N.Y.S.2d 962 (1st Dept. 1964). Any claim of fraud, moreover, is insufficient. Plaintiff must show misrepresentation, concealment or nondisclosure of a material fact, intent to deceive on the part of the defendant, justifiable reliance upon the misrepresentation and injury as a result of such reliance. See, *e.g., Van Alen* v. *Dominick & Dominick, Inc.*, 441 F. Supp. 389, 403 (S.D.N.Y. 1976), *aff'd*, 560 F.2d 547 (2d Cir. 1977); *Horowitz* v. *Sprague*, 440 F. Supp. 1346 (S.D.N.Y. 1977). There is no evidence to support such a claim. Nor is there evidence of "intentional infliction of harm, done with the purpose to injure the plaintiff, without economic or social justification, by means which would be lawful but for the malicious intent." *Effective Communications West, Inc.* v. *Board of Co-op. Ed.*, 395 N.Y.S.2d 296, 299 (4th Dept. 1977), *quoting Ruza* v. *Ruza*, 146 N.Y.S.2d 808, 811 (1st Dept. 1955). See also *Board of Educ. of Farmingdale Union Free School Dist.* v. *Farmingdale Classroom Teachers Ass'n., Local 1889*, 38 N.Y.2d 397, 405-06 (1975). Plaintiff's causes of action in conspiracy to commit fraud and prima facie tort must therefore be dismissed.

Accordingly, defendant's motion for summary judgment dismissing the complaint is granted as to plaintiff's third

and fourth causes of action but denied as to the first and second causes.

So Ordered.

The Clerk of the Court is directed to furnish copies of this memorandum and order to counsel for the parties. Counsel are directed to appear for a pre-trial conference in accordance with the court's practice to be held in Chambers, Room 252, on June 5, 1980, at 4:00 p.m.

/s/ Edward R. Neaher

U. S. D. J.

Dated: Brooklyn, New York
May 16, 1980